Musyoka v Republic (Criminal Appeal 72 of 2019)
[2025] KECA 51 (KLR) (17 January 2025) (Judgment)

Neutral citation: [2025] KECA 51 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 72 OF 2019

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

JANUARY 17, 2025

BETWEEN

DANIEL MUSYOKA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Bungoma (Ali Aroni, J.) dated 12th February, 2016 in HCCRC No. 23 of 2016)

JUDGMENT

1. The appellant, Daniel Musyoka, was arraigned before the Bungoma High Court facing a single count of murder contrary to section 203 as read with section 204 of the Penal Code. The alleged particulars were that on the 28th day of March, 2016, at Kwafu village, Toloso sublocation of Namwela Division within Bungoma County, the appellant murdered Jackson Kundu Nakonya (deceased).

2. The appellant pleaded not guilty to the charge and the case proceeded to hearing. The prosecution called nine (9) witnesses and closed its case. Put on his defence, the appellant gave sworn testimony and called three witnesses. The trial court also summoned one witness to testify. In a judgment dated and delivered on 12th February, 2019, the learned Judge (Ali-Aroni, J., as she then was) convicted the appellant of the lesser but cognate offence of manslaughter and thereafter sentenced him to serve ten (10) years imprisonment.

3. The appellant is dissatisfied with that decision and has appealed to this Court against both the conviction and sentence.

4. As aforesaid, the prosecution case was narrated through nine (9) witnesses and one witness who was summoned by the trial court to clarify issues. In short, the deceased, a retired officer of the Kenya Defence Forces, died on 16/04/2016 while undergoing treatment for head injuries. It was alleged that

he sustained the injuries at the hands of the appellant during and immediately after his arrest in Kwafu Village, Toloso location on 28/03/2016. The appellant was commanding a group of police officers who went to the home of Rose Wafula to make arrests over what they suspected was the selling of illegal traditional brew at the home. The deceased was in the home at the time.

5. The structure of the prosecution case was given at trial by Anthony Barasa, who testified as PW4. He belongs to the same clan as the deceased. It was at his home where the deceased was arrested. Rose Wafula, the person who the police suspected made and sold the traditional brew, is Anthony's mother.

6. Anthony told the court that the deceased had gone to his home at Toloso sub-location of Namwela Division within Bungoma County in his capacity as the Chair of the clan to resolve some land dispute. They were out on the land but it started raining and all the participants in the session – including the deceased – went to shelter in his homestead. Anthony's mother had prepared busaa, the traditional brew. After the rain ceased, the police arrived in a police vehicle. They began arresting the people who were partaking of the busaa. Anthony told the court that the police did so violently. Anthony, the deceased, and others were placed in the police vehicle and transported to Sirisia Police Station. Before then, however, Anthony saw the appellant viciously hitting the deceased on the neck with his fist until the deceased fell to the ground. He also saw the appellant continually hitting the deceased on the head with his gun while they were in the police vehicle as they were being transported to Sirisia. They were all at the back of the police vehicle. Anthony was categorical that the appellant sat at the back with them – together with four other police officers. Altogether, seven people had been arrested and were in the vehicle.

7. David Namusaba Wanyama, a cousin to the deceased, testified as PW5. He is also from Kwafu village. He conceded that he was at Anthony's home to drink busaa on 28/03/2016. He was inside a house in the homestead with other people. He said the deceased was not with them. However, when it started raining, the deceased, who was resolving a land dispute in the field, came into the house to shelter from the rain. When the rains stopped, the police arrived. David testified that he and his colleagues who were drinking busaa were arrested and hand-cuffed. The arresting officers, he said, were beating them. The deceased, who had not been arrested by then, protested at the beatings and told the officers that once a person has been hand-cuffed, he should not be subjected to physical violence because such a person is incapable of causing harm to the officers. David told the court that once the deceased said that, two officers approached him menacingly. One was the appellant who hit him with his gun on the back of his head. The blow was so violent that the deceased fell to the ground in a heap. The other officers continued to beat up the deceased while he was on the ground. He said that they continued beating him severely and only stopped when Benson Bufuke Opicho, a retired senior police officer, who was present at the scene, went and asked the appellant to stop. The deceased was bundled at the back of the police vehicle together with David and five others and taken to Sirisia Police Station. On their way there, David said he witnessed the officers continually hitting the deceased; and that he specifically saw the appellant hitting the deceased.

8. The deceased's wife, Guandancia Nyasiri Sifuma, testified as PW2. She told the court that she received a call from a relative on 30/03/2016 informing him that her husband had been beaten and arrested but that the relative had bonded him out. He needed to be taken to the hospital. Guandancia traveled home and took him to hospital the following day. The deceased died a few days later while at the Intensive Care Unit (ICU) of the Avenue Hospital where he was receiving treatment.

9. When Guandancia found her husband, he had a visibly swollen head and ears; and his eyes were red. The deceased told her that Musyoka had hit on the head at the home of a neighbour as they shielded from the rain. The deceased told Guandancia that Musyoka and other police officers continued hitting him after he fell. He was thereafter chained to the police vehicle and taken to Sirisia Police Police before

being transferred to Malakisi Police Station. He also told Guandancia that he was beaten while at Malakisi although he did not name who had done so.

10. Mike Sindani, PW3, is a nephew to the deceased. He also received news that his uncle had been arrested and was at Sirisia Police Post. He traveled there on 28/03/2016. When he got to the Police Post, an officer advised him to leave even before he had seen his uncle. But before he left, he saw the deceased being led to a police vehicle. His shirt was torn. Mike also said that he saw a police officer put his foot on the deceased's neck. He also said he saw the deceased being removed from the police vehicle. He then saw the appellant hitting the deceased on the head with a gun before bundling him back to the police vehicle. After that, the deceased was taken to Malakisi Police Station. When Mike went to see him at Malakisi Police Station the following morning, the deceased was in bad shape.

11. Cpl Chesaria Bruno, PW5, was at Sirisia Police Post when the group of police officers and arrested personss from Kwafu village arrived. He said he recorded an incident of a police officer, Dennis Kiplagat, who had been injured on the head while effecting an arrest at Kwafu village in Toloso location at the home of Rose Wafula. Kiplagat was in the company of the appellant, who was commanding the operation. Cpl Chesaria said that he was informed that as the police were effecting the arrests, the deceased incited members of the public against the police resulting in a commotion during which Kiplagat was injured. He conceded that the deceased was also injured, but said that he was injured as he tried to resist arrest. He issued Kiplagat with a P3 form but placed the deceased with the six others in the police cells. He conceded that he did not seek any treatment for the deceased but denied participating in beating him up. He also conceded that the entry in the OB stating that Kiplagat had been hit on the head and one stating that the deceased had been booked for incitement, resisting arrest and assault was made by the appellant who is an inspector of police and not by him.

12. The Officer Commanding Malakisi Police Station at the time was Chief Inspector Samwel Kipngeno. He testified as PW8. He testified that on 28/03/2016, at around 10:00pm, Administration Police Officers brought some suspects to the station. One of them, the deceased, seemed to be in a lot of pain. The pain was in the chest and head. He formed the opinion that the pain was severe and instructed the arresting officers to first take the deceased for treatment. They did so and returned him to the station thereafter and placed him the cells. The following day, the Chief Inspector found the deceased still complaining of pain and he used his discretion to release him on cash bail.

13. Samson Makonya, a brother to the deceased, testified as PW7. He identified the body for post-mortem examination on 21/04/2016.

14. The autopsy was conducted by Dr. Philip Koskey and Dr. Daniel Owuor. Dr. Koskey testified as PW1 and produced the report. On internal examination, he noted subdural haematoma of the parietal occipital (the top of the head) and back with compression of the brain. The body also had right side haematoma. He formed the opinion that the cause of death was increased intra-cranial pressure secondary to huge left-sided parietal haematoma and right-side occipital parietal haematoma.

15. ASP Benard Chepkwony was the investigating officer in the case. He testified as PW9. The matter was reported by PW2 on 18/04/2016. She told ASP Chepkwony that the deceased had died while undergoing treatment for injuries he received when he was assaulted by police officers during his arrest on 28/03/2016. He commenced investigations, recorded statements and sent the file to ODPP for advice. He was instructed to charge the appellant with the murder of the deceased.

16. At the conclusion of the prosecution case, the trial court placed the appellant on his defence. He gave a sworn statement and called two witnesses.

17. In short, the appellant denied that he assaulted the deceased or caused his death. He conceded that on 28/03/2016, he had been tasked by the OCPD to do patrols and keep peace in the Toloso area. When he and his officers got to Kwafu, they learnt that there was a home where illicit brew was being sold and drank. They proceeded to the homestead and began arresting the offenders. The appellant testified that the deceased came forward, challenged the police stating that he was an ex-police officer, and then incited the public against the police. This led, he said, to the members of the public attacking the police officers leading to the injury of one of them. In turn, he instructed his officers to arrest the deceased. He denied that he assaulted the deceased either at the scene or later in the police vehicle pointing out that due to his rank as an inspector of police he could not have sat at the back of the vehicle. He insisted that he sat at the front and never assaulted the deceased but conceded that the deceased complained of a headache at the police station.

18. DW2, Sgt James Lisungu backed up the appellant's narrative. He was part of the mission at Kwafu village and he, too, testified that the deceased resisted arrest leading to violence in which one of the officers was injured. They, however, managed the situation, made arrests and transported those arrested to Sirisia Police Post. He supported the appellant's claim that the appellant sat at the front of the police vehicle on the journey back and that, therefore, he could not have assaulted the deceased during that journey. He conceded that the deceased complained about a headache when they got to Malakisi Police Station.

19. DW3, APC Eric Oloo was also part of the police contingent at Kwafu. His testimony was that when they arrived at the scene, people started running away and they were forced to give chase and arrest them. However, APC Oloo testified, the deceased attempted to stop the police from making the arrests and incited members of the public to throw stones at them. In the process, one officer was injured. He denied that the deceased was assaulted by the appellant or any other officer during the arrest or thereafter.

    He, too, however, conceded that the deceased complained about a headache when they got to Malakisi Police Station.

20. At the conclusion of the defence case, the learned Judge took the liberty to summon Benson Bufuke Opicho as a witness. Benson had been mentioned by some witnesses as a former police officer who was present at the scene and who visited the deceased at the police station and eventually took him to hospital. Benson is also a former police officer having served under the appellant. The court formed the opinion that this witness was the most truthful of all the prosecution and defence witnesses who testified.

21. Benson told the court that he witnessed the appellant slap the deceased at Anthony's homestead. Benson intervened and asked the appellant to arrest the deceased instead of meting out violence on him. He saw the deceased together with the other six being arrested and being placed in the police vehicle and being driven away. He was categorical that he saw the appellant sitting at the back of the police vehicle with those arrested as the vehicle left the scene. He visited the deceased at Malakisi Police Station the following day and found him with injuries on the right side of the head and left eye. He was equally categorical that the deceased did not have those injuries the day before as he was being arrested.

22. Benson requested the OCS to release the deceased on bond so that he could take him to hospital. When he did so, the deceased told him that it was the appellant who had hit him on the head. He took the deceased to hospital; and later learnt of his sad demise. In cross-examination, he was, again, categorical that the deceased did not resist arrest but questioned why he was being assaulted by the officers. He told the court that the police neither asked him to record a statement or to attend court as a witness.

23. Based on this evidence, the learned Judge was persuaded that the deceased was in good health when he was arrested but that he was assaulted by the appellant during the arrest and as he was being transported to Sirisia Police Post. However, the learned Judge found that the element of malice aforethought was lacking. Consequently, the learned Judge convicted the appellant of the offence of manslaughter.

24. As we discern them, the appellant has, through his advocates, Juda Indiso raised nine grounds of appeal some of which overlap. We have phrased it this way because the grounds are contained in the advocate's written submission but done in an attenuated and oblique way that makes it difficult to follow lucidly. In any event, we will address all the grounds in our analysis below.

25. First, we will state the standard of review. This is a first appeal. As such, we are required to exercise de novo review: we are to consider the case from the same position as the trial court. This duty is amply enunciated in Okeno -vs- Republic [1972] EA 32 thus:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E. A. 424."

26. With that obligation in mind, we have carefully considered the evidence that was before the High Court, the contending oral and written submissions made before us, and the law. The appellant is aggrieved by the judgment of the High Court in which he was convicted of manslaughter contrary to section 202 of the Penal Code as a lesser but cognate offence to the originally charged offence of murder contrary to section 203 as read with section 204 of the Penal Code. The question that we must determine is whether the ingredients of the offence of manslaughter were established by evidence beyond reasonable doubt. We will do so in light of the appellant's grounds of appeal.

27. In Kenya, manslaughter is defined under Section 202 of the Penal Code as the unlawful killing of a person without malice aforethought, meaning there was no intent to kill or cause serious harm. For a person to be convicted of manslaughter, three elements must be proved.

28. First, it must be established that the deceased died. Second, it must be shown that their death was directly caused by the actions or omissions of the accused person. This means there must be a clear causal link between what the accused did (or failed to do) and the death of the deceased. Third, the act or omission that caused the death must have been unlawful or without lawful justification. This excludes situations where the killing was justified, such as in cases of self-defense or some other lawful action.

29. Before analyzing the evidence to determine if all these ingredients were proved beyond reasonable doubt in the present case, we will first consider the first ground of procedural due process raised by the appellant. It is that it was an error for the learned Judge to summon its own witness to wit Benson Bufuke Opicho to testify in the case. This is because, the appellant argues, this violated the appellant's right to fair trial which cannot be derogated from or limited in any way under Article 50 of the *Constitution* of Kenya. The appellant argues that to the extent that the learned Judge relied on

the evidence of this witness, which was highly prejudicial to him, the conviction was tainted and must be reversed.

30. The respondent supports the learned Judge's summoning of the witness, and points out that the learned Judge had authority to do so under section 150 of the Criminal Procedure Code. The witness, the respondent argues, was a crucial one to shed light on the events of 28/03/2016 – and, indeed, his testimony proved that the learned Judge was right.

31. Section 150 of the Criminal Procedure Code empowers a court to summon witnesses at any stage of a trial if their testimony is deemed necessary for a just decision. It states:

> " Power to summon witnesses, or examine person present."
>
> A court may, at any stage of a trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case.
>
> This provision ensures that the court has the authority to obtain all relevant evidence, even if it means calling new witnesses or recalling those who have already testified, to ensure justice is served."

32. From a reading of this section, there is no doubt that a trial court has authority to summon a witness that it considers essential for the just determination of an issue before the court. Indeed, the second part of the section implies that the trial court has an obligation to so do when the witness to be called is essential. The predecessor to this Court, in Kulukana Otim v R [1963] EA 257, while considering section 148 of the Ugandan Criminal Procedure Code which is in pari materia with our section 150 held that:

> It will be seen that the first part of the section confers a discretion, but under the second part, if it appears to a judge that the evidence of a person is essential to the just decision of a case, there is a mandatory duty on the judge (if the witness has not been called) to call him himself...

33. There is no doubt that this section must be used judiciously and must be balanced against the non-derogable right to fair trial under Article 50 of the *Constitution*. It is readily obvious that this section cannot be deployed in any way which would violate an accused person's right to fair trial under Article 50 of the *Constitution*. The section does not, either, permit the trial court to turn itself into an investigatory agency.

34. The question here is whether it is, in fact, true that the summoning by the trial court of Benson Bufuke Opicho to testify was a violation of the appellant's fair trial rights. The appellant argues that it was because the witness had not recorded a statement; was not a prosecution witness but a court witness not called by either party; and was a close relative, business friend and companion of the deceased.

35. With respect, we do not think any of these reasons indicate error on the part of the learned Judge. The record shows that the on 08/11/2018, after the appellant testified, the learned Judge first summoned Benson Bufuke as a "person who is likely to adduce relevant evidence." The learned Judge directed the DPP to make the witness available the following day. The following day, after the defence called its remaining witnesses, the prosecutor informed the court that the witness Benson Bufuke had not been traced. The learned Judge, again, opined that the Benson Bufuke "may have information that

may assist the court" and directed that he should testify. It would seem that the witness was located shortly thereafter and he, in fact, testified on 09/11/2018. The defence objected citing Article 50 of the *Constitution* while the prosecution supported the learned Judge's summons. In a short ruling, the learned Judge stated that she would reserve a lengthy ruling in the final judgment but "for now it suffices that the court summoned the witness as it believes that he has crucial information that will assist the court arrive at a just and fair determination. All parties were notified of the court's intention yesterday."

36. Benson Bufuke Opicho subsequently testified and was cross- examined at length by both the prosecution counsel and the defence counsel.

37. In these circumstances, we find no merit in the appellant's argument that his right to fair trial was violated. He was not only given a fair opportunity to cross-examine the witness but also had an opportunity, if he so wished, to seek an adjournment in order to prepare for the cross-examination. He chose not to do so. We are, therefore, unable to agree with him that his Article 50 rights were violated. Neither do we agree that the witness ought not to have been called simply because he was related to the deceased or was his close business associate. There is no rule that a relative or close business associate cannot testify in a criminal case in which the relative or close business associate was a victim. The only rule is that the defence is afforded an opportunity to cross examine the witness and thereby expose any prejudices, untruths, or half-truths meant to favour the relative or associate or to otherwise impeach their evidence. Finally, we agree with the learned Judge's analysis that from what had emerged during the trial, the evidence of Benson Bufuke Opicho was crucial for the just and fair determination of the case.

38. Having dealt with this issue of procedural due process, we will now turn to the substantive evidential issues to determine if the ingredients of the offence of manslaughter were established in this case.

39. There is no doubt that the deceased died. His wife, PW2, testified that he passed on at Avenue Hospital in Kisumu where he was in the Intensive Care Unit. His brother, PW7, identified the body at the mortuary for the autopsy. Dr. Koskey, who testified as PW1, and Dr. Daniel Owuor performed a joint autopsy and came to certain conclusions rehashed above about the cause of death. The post-mortem examination report was produced as evidence by Dr. Koskey. The fact of the deceased's death cannot be contested.

40. The most crucial questions in this appeal is whether the death of the deceased was caused by the actions or omissions of the appellant; and whether they were caused unlawfully or without any lawful justification.

41. The appellant denies that he assaulted the deceased at all and contests that the cause of death was assault. In this regard, the appellant contested the eye witness accounts of PW3, PW4, PW5, and Benson who all said that they saw him hitting the deceased. He also claimed that he did not sit at the back of the police vehicle as alleged, and that, therefore he could not have continued assaulting the deceased in the vehicle as witnesses claimed. His two witnesses supported this claim. Finally, on appeal, the appellant the contests the cause of death as contained in the postmortem report.

42. The trial Judge considered the duelling accounts and disbelieved the appellant's narrative. In doing so, the learned Judge particularly credited the narrative by Benson Bufuke Opicho, which she found to be measured, forthright and unvarnished. This is what the learned Judge said:

> " 18. Having examined and analysed the evidence of both the prosecution and defence witnesses and that of Benson Bufuke Opicho, it is clear that prior to the incident, the deceased was healthy and had no ailment. It is also clear that during the police raid the deceased stood up to challenge the Police, this

incident excited the crowd and in the process a police officer received a cut. There is sufficient evidence that the deceased was beaten and, as a result, the deceased sustained injuries as he was being arrested at Kwafu and on the way to Sirisia Police Post.

19. The prosecution witnesses pointed to the accused as the person who inflicted injuries on the deceased both at the point of arrest and as they travelled in the police vehicle to Sirisia. The deceased complained of assault on arrival in Sirisia and the matter was referred to the OCS Malakisi Police Station and on getting to the said station, the deceased complained again to the OCS and pointed to the accused as the assailant, eh repeated the same to his wife and to Benson Bufuke when he visited him at Malakisi Police Station. The deceased was consistent in blaming the accused.

.....

21. Though one of the defences by the accused is that he did not sit behind the police vehicle, there is overwhelming evidence from the prosecution witnesses that he indeed sat at the back of the police vehicle and continued his assault upon the deceased. The assault visited upon the deceased was unlawful no doubt and the evidence overwhelmingly points to the accused herein."

43. In this extensive analysis, the learned Judge amply demonstrates that there was overwhelming evidence that the appellant assaulted the deceased at the point of arrest. This was the evidence of PW4; PW5 and Benson. The evidence also showed that, contrary to his protestations, the appellant sat at the back of the police vehicle. This was the evidence of PW4; PW5 and Benson. It further showed, on the strength of two witness – PW4 and PW5 – that the appellant continued assaulting the deceased while in the police vehicle as they journeyed to Sirisia Police Post.

44. These testimonies are circumstantially corroborated by two pieces of evidence: first, that on arriving both at Sirisia Police Post and at Malakisi Police Station, the deceased complained of a severe headache. These complaints come on record through the testimonies of PW5 (Cpl. Bruno, at Sirisia Police Post); PW8 (Chief Inspector Kipngeno, at Malakisi Police Station); and all the defence witnesses – including the appellant himself. All of them confirmed that the deceased complained of a headache when he arrived at the Police Post and Police Station. Indeed, the pain was so severe that Chief Inspector Kipngeno refused to admit the deceased into the cells before he had been treated. This evidence is crucial because it shows that while the deceased appeared healthy and okay at the time he was being arrested, he was patently ill by the time he was being booked at Malakisi Police Station. The only conclusion to be drawn from that is that PW4 and PW5 surely told the truth when they testified that the appellant continued assaulting the deceased in the police vehicle as they traveled to Sirisia Police Post.

45. The second category of evidence which provides support for the conclusion that the appellant assaulted the deceased are the statements made by the deceased to his wife, Guandancia (PW2), and Benson Bufuke Opicho. He told both of them that it was the appellant who had assaulted him on the head; and that he had done so at the point of arrest and in the police vehicle. These statements can be classified as dying declarations. This Court has been clear that under section 33(a) of the *Evidence Act*, dying declarations are admissible in evidence as an exception to the rule against admissibility of hearsay evidence. Statements made by a person who is dead are admissible where the cause of his death is in question and those statements were made by him as to the cause of his death. See Philip Nzaka Watu Vs. Republic [2016] eKLR.

46. On appeal, the appellant argues that there is no demonstration that the cause of death of the deceased was, in fact, the alleged assault. In this regard, the appellant makes three arguments. First, he argues that it was improper and potentially distortionary for pathologists to perform an autopsy on a body that had been previously embalmed. Second, he argues that the autopsy report was internally contradictory because Dr. Koskey claimed that he found the presence of subdural haematoma, yet he said he saw no external injuries. Third, the appellant argues that since the cause of death was intra-cranial pressure, it had not been proved beyond reasonable doubt that the pressure was caused by assault. In particular, the appellant hypothesizes that it could have been caused by other factors such as aneurysm; brain tumor; infections such as meningities; blood thinning medicines; or alcohol abuse.

47. The appellant argues that the trial court failed to have taken account of the fact that "the deceased was elderly, alcoholic, Ex- KDF and vulnerable [to these other] factors." The appellant also hypothesizes that the "deceased was alcoholic, violent in nature and could have sustained injuries elsewhere not necessary (sic) as alleged. The expert report produced in court indicate poisoning and subsequent possible cover up by PW2 by blaming the appellant for her deceased husband's death."

48. We think that the evidence on record, viewed in its totality, leads to the conclusion that the intra-cranial pressure was, indeed, the result of the trauma on the deceased's head caused by the appellant. The appellant offered no evidence that embalming affected the accuracy of the expert evidence of Dr. Koskey. Neither did the appellant sufficiently impugn the cause of death established by Dr. Koskey to establish reasonable doubt. The speculative hypothesis on the causes of intra-cranial pressure made by way of submissions by the appellant, do not take the place of evidence which should have been placed before the trial court to come to its conclusions on whether there was reasonable doubt as to the cause of death. We note that these hypotheses were not introduced during the trial for fact-finding. They cannot be sneaked in through submissions at the appellate level. Based on the evidence that was before the trial court, we have no hesitation in agreeing with the factual findings of the trial court that the cause of death was intra-cranial pressure secondary to the blunt force trauma to the head of the deceased; and that the trauma was caused by the appellant when he assaulted the deceased.

49. We finally consider whether the acts that caused the death was lawful or had any lawful justification. The appellant forcefully argues that it was wrong to blame the appellant as the team leader for the "use of reasonable force in effecting an arrest of the deceased who was armed and dangerous and even wounded and injured APC Dennis Kiplagat."

50. The appellant obliquely suggests that the violence meted out on the appellant was proportionate and reasonable use of force in effecting an arrest. In doing so, the appellant suggests that the third element for the offence of manslaughter – namely the absence of lawful justification for causing the death - is not satisfied. The appellant suggests that the assault of the deceased was reasonable use of force in effecting his lawful arrest.

51. On this point, the learned Judge reached the following conclusion:

> " The arrests were done in the course of duty by the police officers. However, from the evidence on record, the beating was unnecessary as the deceased was not armed and if one was to go by the defence, he was drunk and one is left to wonder why he was so severely beaten.
>
> The only explanation I find from the action of the accused is that he must have been incensed by the challenge posed by the deceased as they effected arrests. This is not a justification at

all. However, I do not find that there was an intention to kill on the part of the accused though clearly the injuries inflicted led to the deceased's death."

52. We agree with the learned Judge that there is on record no justification for the kind of force used on the deceased; and that this was no reasonable use of force at all. As analysed above, the appellant continued assaulting the deceased in the police vehicle long after he had been arrested and subdued. There was, therefore, no lawful justification for the conduct by the appellant. Indeed, the appellant is fortunate that the learned Judge reduced the charge to one of manslaughter. One can, without too much effort, read the requirement of malice aforethought as having been satisfied in the form of an intention to cause grievous harm. If one continually targets the head of another with vicious blows, under section 206 of the Penal Code, malice aforethought is deemed to have been established if the person eventually dies as a result of the blows. Differently put, the appellant is extremely fortunate to have received a conviction of the lesser but cognate offence of manslaughter. We note, however, that the DPP did not cross- appeal. We will, therefore, leave the learned Judge's legal findings undisturbed on this point.

53. The upshot is that, in our view, all the elements of the offence of manslaughter were satisfied here. Consequently, the appeal against conviction is hereby dismissed. We found no ground specifically addressing the sentence. We, however, note that the appellant was sentenced to ten (10) years imprisonment. The court explicitly considered his mitigation in fashioning the sentence. We think the sentence is eminently reasonable in the circumstances. We will not interfere with it. The result is that the appeal is dismissed in its entirety.

54. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 17TH DAY OF JANUARY,2025.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR